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In the Supreme Court of the United States

OCTOBER TERM, 1998

GRUPO MEXICANO DE DESARROLLO, S.A., *et al.*,
Petitioners

v.

ALLIANCE BOND FUND, INC., *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether a United States District Court, sitting in diversity, is empowered to issue a preliminary injunction prohibiting a defendant from transferring or assigning assets unrelated to the plaintiff's underlying claim and held outside of the court's jurisdiction in order to ensure that funds will be available to satisfy a potential money judgment.

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Rule 29.6 of the Rules of this Court, Petitioners Grupo Mexicano de Desarrollo, S.A.; Desarrollo de Infraestructura, S.A. de C.V.; Obras Y Proyectos, S.A. de C.V.; Desarrollo Urbano Integral, S.A. de C.V. and Desarrollo Industrial Latinoamericano, S.A. de C.V. hereby certify that Grupo Mexicano de Desarrollo, S.A. is the corporate parent of the other named petitioners.

AMENDED LIST OF NON-WHOLLY OWNED SUBSIDIARIES

Grupo Mexicano de Desarrollo, S.A.'s additional non-wholly owned subsidiaries are:

Promotora Domus, S.A. de C.V.;
Welinns de Mexico, S.A. de C.V.;
Desarrollos Hidraulicos de Morelos, S.A. de C.V.;
Concesionaria Mexicana de Vias Terrestres, S.A. de CV;
Promotora JL, S.A. de C.V.

Desarrollo de Infraestructura, S.A. de C.V.'s additional non-wholly owned subsidiaries are:

Promotora JL, S.A. de C.V.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 143 F.3d 688. The order of the district court issuing the preliminary injunction (Pet. App. 22a-27a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a) was entered on May 6, 1998. The petition for a writ of certiorari was filed on August 4, 1998, and was granted on November 30, 1998. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RULES AND STATUTES INVOLVED

This case involves Rules 64 and 65 of the Federal Rules of Civil Procedure. (Pet. App. 60a-63a). New York Civil Practice Law and Rules §§ 6201 and 6301 are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

This appeal addresses the question whether a federal district court, sitting in diversity, has the inherent equitable power to issue a preliminary injunction to preserve assets for a potential money judgment when such relief is unavailable under the law of the state in which the district court sits.

Petitioners, a consortium of Mexican construction companies ("GMD"), issued $250,000,000 of unsecured notes (the "Guaranteed Notes"), approximately $76,000,000 of which were purchased by respondents, the plaintiffs below. (C.A. 235, 240).[1] GMD defaulted on an interest payment on those notes and respondents filed a complaint in the district court alleging breach of contract.[2] (J.A. 23-32). Respondents also sought a temporary restraining order and a preliminary injunction to restrain GMD from using its primary asset—the right to receive approximately $309,000,000 of unrelated notes to be issued by the Mexican Government (the "Toll Road Notes"). (J.A. 30-31).

In seeking the injunction, respondents argued that injunctive relief was necessary to ensure that GMD, which had already assigned to certain creditors in Mexico its right to receive a portion of the Toll Road Notes, did not make further assignments that might prefer other creditors over respondents and might frustrate enforcement of a potential money judgment in respondents' favor. (J.A. 30-31). Respondents also cited the possible insolvency of GMD

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[1] "C.A." refers to the confidential joint appendix in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

[2] The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 because the amount in controversy exceeded $75,000, exclusive of interest and costs, and the action was between citizens of a state and citizens or subjects of a foreign state. In issuing the Guaranteed Notes, GMD consented to personal jurisdiction in New York solely in connection with the notes. GMD has no business or assets in New York or in the United States. (C.A. 147).

as a justification for the injunction. (J.A. 30). There was no suggestion that the prior assignments in favor of the other creditors were not on account of valid obligations of GMD. (J.A. 29-30). The district court granted respondents' motion for a temporary restraining order on December 12, 1997 (Pet. App. 55a-57a) and respondents' motion for a preliminary injunction on December 23, 1997. (Pet. App. 22a-27a). The court of appeals affirmed the preliminary injunction by opinion and order dated May 4, 1998. (Pet. App. 1a-21a).

The decision of the court of appeals was erroneous (a) because a district court lacks the inherent equitable power to issue such a preliminary injunction in an action for money damages and (b) because a district court sitting in diversity in New York must apply New York law, which does not permit such an injunction to issue.

A. Background

GMD, the fourth largest construction company in Mexico, is engaged in the construction of a broad range of public works and infrastructure projects in Mexico and throughout Latin America, including highways and toll roads, bridges, tunnels, water works, dams, airports, and port facilities. (C.A. 234). For example, GMD has constructed toll roads throughout Mexico and operates the water purification and delivery systems for the City of Cancún. (C.A. 234).

The Guaranteed Notes

In February 1994, GMD issued to institutional investors $250 million of Guaranteed Notes due in 2001, for general corporate purposes. (C.A. 235). Interest payments, at the rate of 8¼ percent per annum, were scheduled to be made on February 17 and August 17 of each year. (C.A. 235). The Guaranteed Notes constitute unsecured obligations that rank *pari passu* in priority of

payment with all other general unsecured indebtedness of GMD. (C.A. 235-36).

The Mexican Toll Road Rescue Program

From approximately 1990 through 1994, GMD participated in the Mexican Government's program to develop a modern intercity highway network. (C.A. 236). Under this program, the Mexican Government granted concessions to private companies (the "Toll Road Concessionaires") to build and operate toll roads throughout Mexico. (C.A. 236). The Toll Road Concessionaires engaged construction companies, such as GMD, to build the roads. (C.A. 76-79). GMD and the other construction companies then billed the Toll Road Concessionaires for that construction. (C.A. 76-79).

Commencing in late 1994, Mexico went through a period of severe economic dislocation leading to the devaluation of the peso. (C.A. 236). As a result of this economic downturn, toll road traffic and revenues fell below anticipated levels, causing the Toll Road Concessionaires to suffer substantial losses. (C.A. 236). These losses, in turn, prevented the Toll Road Concessionaires from paying the debts owed to GMD and the other construction companies. (C.A. 67). In an effort to facilitate the continued success of the toll road construction program, the Mexican Government implemented the Toll Road Rescue Program on September 1, 1997. (C.A. 236). Under the terms of the Toll Road Rescue Program, the Mexican Government promised to issue government-guaranteed Toll Road Notes to GMD and other toll road construction companies to reimburse them for approximately one third of the unpaid construction receivables and expenses (the "Toll Road Receivables") owed by the Toll Road Concessionaires. (C.A. 236-37). Certain of the Toll Road Receivables are eligible to be paid with Toll Road Notes when those notes are issued by the Mexican Government. (C.A. 7). In return, the Mexican Government assumed

ownership and operation of the toll roads. (C.A. 236). GMD disclosed in its Third Quarter 1997 financial statements that preliminary estimates indicated that it expected to receive $309 million under the Toll Road Rescue Program. (C.A. 236).

GMD's Restructuring Efforts

The Toll Road Notes will compensate GMD for only a small portion of the approximately $961.4 million invested by GMD in the construction of the Mexican toll roads. (C.A. 237). GMD could not sustain such losses and has instituted plans to restructure its debt, reduce its costs, and seek additional equity contributions in order to improve its financial situation. (C.A. 237). Such efforts were not kept secret from respondents or GMD's other creditors. (C.A. 237). For example, a Reuters Report dated August 26, 1997, and received by respondents on August 27, 1997, indicated that GMD had begun to renegotiate its $256 million debt to its Mexican banks, and that it would seek a discount from the banks of 67 percent to match GMD's losses from its expenditures on toll road construction. (C.A. 237). This report also made clear that, although GMD would begin its restructuring efforts by negotiating with its Mexican banks and other creditors, it would also address the holders of the Guaranteed Notes. (C.A. 263).

GMD's restructuring efforts included the irrevocable assignment of $30 million in Toll Road Receivables to a Mexican trust created to fund employee severance packages estimated at approximately $17 million. (C.A. 237, 286).[3] The severance packages were owed to the employees under Mexican law as the result of GMD's reduction of its work force in connection with the company's efforts to restructure its operations. (C.A. 237). GMD

[3] Any assignment made in excess of the amounts owed by GMD will be returned to GMD upon issuance of the Toll Road Notes. (C.A. 286).

then assigned $137 million of Toll Road Receivables to the Mexican Treasury Minister and Social Security Institute to pay approximately $100 million in taxes owed to the Mexican Government as required by the terms of the Toll Road Rescue Program. (C.A. 238, 286). GMD also assigned an additional $38 million in Toll Road Receivables to a Mexican bank in exchange for working capital credits to permit GMD to continue operations pending receipt of amounts due under the Toll Road Rescue Program. (C.A. 238).

In October 1996, prior to the announcement of the Toll Road Rescue Program, GMD had also assigned approximately $42 million in Toll Road Receivables owed to GMD by the Toll Road Concessionaires to pay several outstanding loans. (C.A. 287). Those Toll Road Receivables are also eligible to be paid with Toll Road Notes when they are issued.

Negotiations Between GMD And The Noteholders

Since September 1997, GMD has been involved in negotiations with the holders of the Guaranteed Notes in an effort to facilitate a restructuring of GMD's finances and a settlement of GMD's obligations towards the holders of the Guaranteed Notes. (C.A. 238). Various proposals were made but the parties were unable to reach an agreement. (C.A. 238-40). This resulted in the respondents filing their complaint and application for a preliminary injunction.

B. The Decisions Below

The district court found that respondents "satisfied their burden for the issuance of a preliminary injunction because: (1) they would almost certainly succeed on their breach of contract claims against GMD; and (2) without the injunction they faced an irreparable injury since GMD's financial condition and dissipation of assets would frustrate any judgment recovered." (Pet. App. 6a). The

preliminary injunction, which was in effect for four months (from December 23, 1997 through April 17, 1998), interfered with GMD's efforts to restructure its debt and substantially impaired GMD's ability to continue its operations in the ordinary course of business. If the decision of the court of appeals is reversed, GMD will be entitled to damages to the extent that it can show harm resulting from the wrongful issuance of the injunction. *See, e.g., H.E. Fletcher Co. v. Rock of Ages Corp.*, 326 F.2d 13, 17-18 (2d Cir. 1963).[4]

On appeal, GMD, which has no assets or operations in the United States, challenged the district court's authority to issue a preliminary injunction prohibiting GMD from transferring or conveying assets that are unrelated to respondents' underlying claim and are held outside the court's jurisdiction. GMD did not contest the district court's findings of irreparable harm or the likelihood that respondents might ultimately prevail on the merits.

The court of appeals affirmed, holding that a district court may exercise its "general equitable power" to issue a preliminary injunction "to ensure the preservation of an adequate remedy." (Pet. App. 12a). The court of appeals explicitly recognized that other circuits had rejected the notion that a federal district court may exercise its inherent powers to enjoin a defendant's use of assets that bear no relationship to the plaintiff's underlying claim. (Pet. App. 13a). Since the decision of the court of appeals, the Fourth Circuit has joined the Fifth, Tenth, and Eleventh Circuits in holding that a preliminary injunction may not issue in these circumstances. *See United States v. Cohen*, 152 F.3d 321 (4th Cir. 1998).

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[4] Respondents filed a "Suggestion of Mootness" with the court of appeals on April 17, 1998, contending that GMD's appeal was moot because the district court had entered a final judgment in respondents' favor. (J.A. 108-09). That "Suggestion of Mootness" was rejected by the court of appeals by order dated May 4, 1998. (J.A. 117-18).

C. Subsequent Proceedings

While GMD's appeal was *sub judice,* respondents moved in the district court for summary judgment and, simultaneously, for an order directing GMD to assign irrevocably to respondents a sufficient quantity of Toll Road Receivables or Toll Road Notes to satisfy respondents' judgment (the "Turnover Order"). (J.A. 110-11). Both motions were granted by judgment and order dated April 17, 1998. (J.A. 110-12).

GMD has appealed the propriety of the Turnover Order. The decision of the district court has been stayed by the court of appeals pending the outcome of that appeal. (Docket No. 98-7549, argued on December 10, 1998.)

SUMMARY OF ARGUMENT

The decision of the court of appeals expands the district court's inherent power to issue injunctive relief beyond that recognized by this Court or authorized at common law. This Court has sanctioned the use of preliminary injunctive relief in equitable actions to restrain a defendant's use of specific assets directly related to the plaintiff's claim in order to preserve those assets for an ultimate judgment. This Court has never condoned a district court's issuance of a preliminary injunction to secure a potential money judgment.

The inherent powers of a federal district court are those necessary for the performance of its duties and the administration of justice. They are rooted in the common law equity tools of the English Courts of Chancery to be exercised only in those exceptional circumstances in which congressionally authorized powers fail to protect the processes of the court. There is, however, no common law predicate for the preliminary injunction issued by the district court. In fact, the relief granted by the district court was expressly unavailable at common law. Moreover, under the Rules Enabling Act, a mechanism has been

provided for the district courts to preserve a defendant's assets to ensure satisfaction of a potential money judgment. That mechanism is encompassed in Rule 64 of the Federal Rules of Civil Procedure which directs the district courts to rely on state law provisional remedies. Rule 65 of the Federal Rules of Civil Procedure, by contrast, merely dictates the proof requirements for determining whether a preliminary injunction may issue in a particular case. Absent some other congressional mandate or inherent equitable power recognized at common law, a district court has no authority to issue preliminary injunctive relief.

But even apart from the broad question of whether a federal district court ever may exercise some inherent power to enjoin a defendant's use of assets to secure a potential money judgment, the preliminary injunction in this case was improper. This is a diversity action, and a district court sitting in diversity should be precluded from issuing an injunction when such relief is unavailable under state law. This Court's decisions, beginning with *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938), dictate that a federal court exercising diversity jurisdiction should apply state law unless: (i) a federal statute or Federal Rule of Civil Procedure controls the issue before the court and that provision represents a valid exercise of Congress' constitutional power or (ii) the application of federal judge-made law simply does not implicate the concerns of *Erie*—discouraging forum shopping and ensuring the equitable administration of the laws.

In this case, the district court relied on its inherent powers, not a federal statute or Federal Rule of Civil Procedure, to issue the preliminary injunction. There is no dispute that the injunction could not have been issued by a New York state court judge. Consistent with *Erie*, the district court should not have exercised its asserted inherent powers in contravention of New York law. By enjoining GMD from using its assets in order to preserve funds to satisfy a potential money judgment, the district

court (and the court of appeals) gave respondents an advantage that a New York state court judge could not provide. The result is that plaintiffs able to comply with 28 U.S.C. § 1332 can avail themselves of the more liberal provisional remedies available in federal district court. Under ths regime, a defendant in complete diversity with the plaintiff could be subjected to restraints on its assets that could not be imposed on a New York defendant in an action brought by a New York plaintiff.

ARGUMENT

I. A FEDERAL DISTRICT COURT DOES NOT HAVE THE POWER TO ISSUE A PRELIMINARY INJUNCTION TO RESTRAIN A DEFENDANT'S USE OF ASSETS IN ORDER TO PRESERVE FUNDS TO SATISFY A POTENTIAL MONEY JUDGMENT

This Court has never held that a federal district court may issue a preliminary injunction to preserve assets to satisfy a potential money judgment. This Court has held only that a preliminary injunction is available when a plaintiff, in an action for equitable relief, seeks an injunction with respect to the same *res* or thing that is the subject of its underlying claim. Neither Fed. R. Civ. P. 65 nor common law principles countenance the preliminary injunction issued by the district court.

A. This Court Has Never Authorized The Issuance Of A Preliminary Injunction To Secure A Potential Money Judgment

This Court first addressed the propriety of preliminary injunctive relief to preserve assets for a final judgment in *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940). In *Deckert*, purchasers of securities brought suit under the federal securities laws to rescind contracts that they alleged were induced by fraud. The securities were held in a trust administered by a third party trustee. The plaintiffs sought and were awarded a preliminary injunction restraining the trustee from transferring or otherwise disposing of trust assets purchased with funds that the plaintiffs alleged they were fraudulently induced to pay. *Id.* at 285. This Court affirmed the issuance of the injunction, holding that it was "a reasonable measure to preserve the status quo pending final determination" of the suit because the plaintiffs had shown that there was a danger that the defendant would dissipate or deplete the assets contained in the trust in anticipation of an adverse judgment. *Id.* at 290. *Deckert* stands for the proposition that a preliminary equitable remedy will issue to preserve a final equitable remedy of restitution or constructive trust when the plaintiff has an equitable claim to a specific *res* or thing in the possession of the defendant.

In *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 220 (1945), this Court refined its decision in *Deckert* by holding that a preliminary injunction may not issue to secure assets for a final judgment if the assets to be restrained are not of the same "character" as the subject of the plaintiff's underlying action. In *De Beers*, the United States commenced an action against several foreign corporations and individuals alleging that they had "engaged in a conspiracy to restrain and monopolize the commerce of the United States with foreign nations in gem and industrial diamonds" in violation of the Sherman Act and the Wilson Tariff Act. *Id.* at 215. The ultimate relief sought in the complaint was a permanent injunction preventing and restraining future violations of the law. Upon commencement of the action, the United States sought a preliminary injunction restraining the defendants from "selling, transferring or disposing of any property in the United States" until the court could adjudicate the government's claims. *Id.* The government predicated its request for injunctive relief on the grounds that "[t]he principal business of said defendants is carried on in foreign countries and they could quickly withdraw their assets from the United States and so prevent enforcement of any order or decree which this court may render." *Id.* In reversing

the decision of the lower court, this Court held that issuance of the preliminary injunction was improper because "it deal[t] with a matter lying wholly outside the issues in the suit." *Id.* at 220.

The Court distinguished *Deckert* on the grounds that the injunction in that case restrained the trustee from transferring specific property that was directly related to plaintiff's securities fraud claim and that therefore would have been the subject of a final decree. By contrast to the situation in *De Beers*, in *Deckert* there was an identifiable *res* at issue in the lawsuit, and an injunction could issue with respect to that *res*. The *De Beers* court recognized the dangers of extending a district court's equitable powers to issue preliminary injunctions outside of the subject matter of the plaintiff's claim:

> To sustain the challenged order would create a precedent of sweeping effect. This suit, as we have said, is not to be distinguished from any other suit in equity. What applies to it applies to all such. *Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him,* indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree. And, if so, it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action. *No relief of this character has been thought justified in the long history of equity jurisprudence.*

325 U.S. at 222 (emphasis added).[5]

[5] In *Rosen v. Cascade Int'l, Inc.*, 21 F.3d 1520, 1528 (11th Cir. 1994), the court of appeals interpreted this language in *De Beers* as suggesting that "the case before [the Court] was worthy of discussion because the United States was, at least, seeking *equitable* relief in the underlying litigation, albeit an injunction that was not of the same 'character' as the preliminary injunction freezing the defendant's assets. It appears to juxtapose that situation against a case seking money damages in tort or contract in which a preliminary injunction freezing assets is requested; in such a case, the Court's language makes clear, a prejudgment asset freeze, without a doubt, would be beyond the power of the district court." (Emphasis in original.)

In *United States v. First Nat'l City Bank*, 379 U.S. 378 (1965), this Court applied the *De Beers* analysis to an action brought by the United States to foreclose a tax lien that previously had been placed on the New York bank accounts of a foreign taxpayer; the government did not sue for money damages. In reversing the court of appeals and sustaining the district court's issuance of an injunction prohibiting the bank from transferring any of the assets it held for the account of the taxpayer, the Court emphasized that the ultimate relief sought in the litigation involved the very same bank accounts and held that "[u]nlike *De Beers* . . . there is here property which would be 'the subject of the provisions of any final decree in the cause.' " *Id.* at 385. Thus, like *Deckert*, *First Nat'l* addressed a circumstance in which there was an identifiable *res*—a group of bank accounts already encumbered by a federal tax lien—that was the subject of the plaintiff's underlying claim.

In this case, the court of appeals held that "*Deckert* and *First Nat'l* endorse the district court's exercise of general equitable power to ensure the preservation of an adequate remedy." (Pet. App. 12a). The court of appeals distinguished *De Beers* as "simply inapplicable to cases in which a litigant seeks money damages." (Pet. App. 11a). Under the court of appeals' analysis, *De Beers* applies only to circumstances in which the remedy sought by plaintiffs is injunctive relief. *Id.* This interpretation of *De Beers* stands the rationale for this Court's decisions on its head. It leads to the anomalous conclusion that a district court presiding over an action at law for money damages has more expansive power to award interim equitable relief, *i.e.*, to issue a preliminary injunction, than a court adjudi-

cating an equitable claim. The courts of appeals that have adopted this view have offered no principled explanation for such an illogical result.[6] In fact, this Court's decisions and fundamental common law principles suggest that a district court's inherent power is not so expansive as to authorize the issuance of a preliminary injunction to restrain a defendant's use of assets to preserve a potential money judgment.

B. The Inherent Powers Of The District Courts Do Not Provide A Basis For The Injunction Issued Here

The inherent powers of federal courts are those which "are necessary to the exercise of all others." *United States v. Hudson*, 7 Cranch (11 U.S.) 32, 34 (1812). The doctrine of inherent powers provides a federal district court "with appropriate instruments required for the performance of [its] duties and essential to the administration of justice." *ITT Community Dev. Corp. v. Barton*, 569 F.2d 1351, 1360 (5th Cir. 1978), *quoting In re Peterson*, 253 U.S. 300, 312 (1920). The doctrine recognizes that "a federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court (sub-

[6] Like the court of appeals in this case, the First, Third, Sixth, and Ninth Circuits have permitted the use of a prelimnary injunction to preserve unrelated assets to secure satisfaction of a potential money judgment. *See In re Estate of Marcos*, 25 F.3d 1467, 1480 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 205 (3d Cir. 1990); *EBSCO Indus., Inc. v. Lilly*, 840 F.2d 333, 334-36 (6th Cir.), *cert. denied*, 488 U.S. 825 (1988); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 53 (1st Cir. 1986).

By contrast, the Fourth, Fifth, Tenth, and Eleventh Circuits have held that, under *De Beers*, an injunction may issue only to restrain the same "*res*" or "thing" that is the subject of plaintiff's underlying equitable claim. *See Cohen*, 152 F.3d at 324; *Rosen*, 21 F.3d at 1527; *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507, 1521 (11th Cir. 1994), *cert. denied*, 513 U.S. 1146 (1995); *Home-Stake Prod. Co. v. Talon Petroleum, C.A.*, 907 F.2d 1012, 1021 (10th Cir. 1990); *In re Fredeman Litig.*, 843 F.2d 821, 824 (5th Cir. 1988).

ject, of course, to congressional limitation) to process litigation to a just and equitable conclusion." *Id.* at 1359. However, "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers v. NASCO*, 501 U.S. 32, 44 (1991), *citing Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980).

The federal district courts have relied on the concept of inherent powers "to impose several species of sanctions on those who abuse the judicial process."[7] *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 561 (3d Cir. 1985). This Court has approved the district courts' exercise of their inherent equitable powers in the issuance of sanctions for contempt (*see, e.g., Levine v. United States*, 362 U.S. 610, 615 (1960)), the dismissal of actions for failure to prosecute (*see, e.g., National Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642-43 (1976); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-30 (1962)), and the suspension or reprimand of attorneys for abuse of the judicial process (*see, e.g., Ex Parte Wall*, 107 U.S. 265, 288-89 (1883)). The decisions of this Court recognize that a federal district court's exercise of its inherent authority is appropriate only in circumstances where such long unquestioned "power is of ancient origin." *Link*, 370 U.S. at 630-31. *See also Guaranty Trust Co. v. York*, 326 U.S. 99, 105 (1945) ("[e]quitable relief in a federal court is of course subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery,"); *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939) ("[t]he 'jurisdiction' . . . conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being adminis-

[7] Here, there was no finding by the district court that GMD abused the judicial process or attempted to perpetrate a fraud on the court. Rather, GMD merely had sought to pay certain of its *bona fide* creditors before respondents.

tered by the English Court of Chancery at the time of the separation of the two countries"); *Payne v. Hook*, 7 Wall. (74 U.S.) 425, 430 (1868) ("[t]he equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses").

There is no traditional predicate for the preliminary injunction issued by the district court in this case. In fact, until 1975, the English Courts of Chancery did not possess the power to grant an interlocutory order enjoining a defendant from disposing of its assets or removing them from the jurisdiction before a judgment was rendered. *See Lister & Co. v. Stubbs*, 1890 45 Ch.D. 1 (Eng. C.A.). *Lister* involved a claim for damages in which a manufacturing company alleged that its employee had engaged in self-dealing. The plaintiff sought preliminarily to enjoin the employee from selling property he had purchased with the undisclosed profits and commissions so that such property would be available to satisfy an ultimate judgment in plaintiff's favor. The court denied the plaintiff's request for preliminary relief, because the plaintiff could not show that the undisclosed commissions received by the defendant (and used to purchase the property) was money belonging to the plaintiff. The *Lister* court distinguished the case before it from a situation in which the plaintiff claimed a trust or some actual proprietary right or interest that attached to the money itself or the asset or thing that was the subject of the action, *i.e.*, an injunction would have been available if the plaintiff had asserted an equitable claim to a specific *res* in the possession of the defendant. *See also* D.W. Shenton, *Attachments and Other Interim Court Remedies in Support of Arbitration: The English Courts*, 1984 Int'l Bus. Law 101.

The English courts only recently have authorized the use of injunctive relief to preserve assets to satisfy a potential money judgment. *See Mareva Compania Naviera, S.A. v. International Bulk Carriers, S.A.*, 1975 2 Lloyd's Rep. 509 (Eng. C.A.); The Supreme Court Act of 1981,

cn. 54 § 37(3) (Eng.).[8] Indeed, in responding to the plaintiff's request for a "Mareva" injunction in the House of Lords case, *Siskina Cargo Owners v. Distos Compania Naviera, S.A.*, AC 210 HL (1979), Lord Hailsham said "[t]hree years ago I would have regarded the [plaintiff's] case as wholly inarguable."

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[8] In *Mareva*, the Court of Appeal rejected long-standing precedent in holding that a preliminary injunction may issue to prevent a defendant from removing assets from the jurisdiction until the conclusion of a trial on the merits upon a showing that (i) a debt is due and owing and there is a danger the debtor might dispose of the assets before judgment, and (ii) if the Court does not issue an injunction, the plaintiff would suffer a great injustice that the Court had the power to help avoid. 2 Lloyd's Rep 509. *Mareva* arose as the result of nonpayment of a debt arising from the charter of a ship. The shipowners issued a writ claiming unpaid hire and damages for repudiation and applied for an *ex parte* injunction restraining the charterer from disposing of monies received as the result of a sub-charter. The trial judge granted the requested injunction for a limited period of time but refused to extend it until after the trial. The shipowners appealed. In ordering the injunction extended until a judgment was rendered, the Court of Appeal recognized that injunctions of this type have "in the past from time to time been applied for but ha[ve] been consistently refused." *Id.* The Court of Appeal relied, however, on Section 45 of the Judicature Act for the principle that "a mandamus or an injunction may be granted . . . in all cases in which it shall appear to the court to be just or convenient." *Id.* Since *Mareva*, English courts have granted what have become known as "Mareva" injunctions to restrain defendants from using or dissipating assets to prevent frustration of potential money judgments. Section 37(3) of the Supreme Court Act of 1981 now provides the statutory predicate for the issuance of a Mareva injunction:

> The power of the High Court . . . to grant an interlocutory injunction restraining a party . . . from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable. . . .

In 1990, the English Court of Appeal sanctioned an expansion of Mareva injunctions to cover assets held outside of the jurisdiction of the English courts. *See, e.g., Republic of Haiti v. Duvalier*, 1990 1 QB 202 (Eng. C.A.).

Unlike in England, in the United States it is exclusively for Congress to extend the inherent powers of the federal courts beyond those that existed at common law. *See, e.g., Snyder v. Harris,* 394 U.S. 332, 340 (1969). Accordingly, absent some common law predicate or congressional initiative, the district court did not possess the inherent power to issue an injunction restraining GMD's use of its assets to preserve funds to satisfy a potential money judgment.

C. The Inherent Powers Of The District Courts Should Not Be Exercised When A Federal Statute Or Federal Rule Of Civil Procedure Is Applicable

This Court should be particularly circumspect in recognizing an inherent power when it provides a means for the district courts to circumvent the provisions of a federal rule. *Bank of Nova Scotia v. United States,* 487 U.S. 250, 254 (1988). To allow otherwise "would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." *United States v. Payner,* 447 U.S. 727, 737 (1980). Accordingly, a "district court should rely on text-based authority derived from Congress rather than inherent power in every case where the text-based authority applies." *Chambers,* 501 U.S. at 64-65 (Kennedy, J., dissenting), *citing Societe Internationale v. Rogers,* 357 U.S. 197, 207 (1958); *Bank of Nova Scotia,* 487 U.S. at 254.

Although Fed. R. Civ. P. 64 does not state in so many words that it is the exclusive source of district court authority to grant provisional remedies, the rule in fact constitutes the only textural basis for a district court's authority to grant such relief.[9] Fed. R. Civ. P. 64 pro-

[9] As discussed in Point II, B. 1, *infra,* Fed. R. Civ. P. 65 establishes the procedural proof requirements for determining whether a preliminary injunction or restraining order may issue in a particular case, but that rule does not itself authorize preliminary injunctive relief.

vides that a federal district court (whether exercising subject matter jurisdiction on the basis of diversity or some other ground) must apply state law in fashioning provisional remedies to secure satisfaction of a judgment unless the Constitution or a federal statute provides otherwise.[10] Fed. R. Civ. P. 64 provides, in pertinent part, that

> all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought . . . .

(Pet. App. 60a). Fed. R. Civ. P. 64 expressly identifies arrest, attachment, garnishment, replevin, and sequestration as available remedies, along with "other corresponding or equivalent remedies, however designated." (Pet. App. 60a). As this Court explained in *Granny Goose Foods, Inc. v. Brotherhood of Teamsters Local 70,* 415 U.S. 423, 436-37 n.10 (1974), "long-settled federal law provide[s] that in all cases in federal court, . . . state law is incorporated to determine the availability of prejudgment remedies for the seizure of person or property to secure satisfaction of the judgment ultimately entered."

Although in this case GMD's property was not technically "seized" (i.e., GMD was not deprived of physical possession of the Toll Road Receivables that entitled it to receive Toll Road Notes), the practical implications were the same. GMD was "enjoined and restrained from dissipating, disbursing, transferring, conveying, encumbering, or otherwise distributing or affecting" its interest in the Toll Road Notes. (Pet. App. 26a). GMD's assets were, in essence, set aside for respondents' benefit. GMD was then ordered to assign those assets to respondents in satis-

[10] Respondents never have contended that the Constitution or a federal statute provides for the injunction here. Nor did the district court rely on the Constitution or a federal statute as the basis for its power to issue the injunction.

faction of the judgment entered in respondents' favor. (J.A. 111). A number of courts have held that "[w]hen faced with motions appearing to call for an attachment but labeled something else, federal courts . . . look past the terminology to the actual nature of the relief requested." *Mitsubishi*, 14 F.3d at 1521, *citing Lechman v. Ashkenazy Enter., Inc.*, 712 F.2d 327, 329-30 (7th Cir. 1983). *See also Rosen*, 21 F.3d at 1530, *citing De Beers*, 325 U.S. at 219 (explaining that "it will be well to note exactly what is the subject of the injunction, since the name given to the process is not determinative."). Here, at the time of its issuance, the "purpose and effect of the injunction [was] to provide security for performance of a future order which may be entered by the court." *De Beers*, 325 U.S. at 219. Accordingly, the "injunction" was simply an attachment by another name.

Permitting the district court to use Fed. R. Civ. P. 65 or its asserted inherent powers to effect what is essentially a prejudgment attachment of assets will enable parties to circumvent the more stringent procedural protections associated with the provisional remedies authorized by Fed. R. Civ. 64. Rule 64 provides a mechanism by which a district court can preserve assets to secure satisfaction of a judgment. Federal district courts should not be authorized to exercise an asserted inherent power to achieve the same result by other means.

II. A FEDERAL DISTRICT COURT SITTING IN DIVERSITY MUST RELY EXCLUSIVELY ON STATE LAW REMEDIES TO PRESERVE A DEFENDANT'S ASSETS TO SECURE A POTENTIAL MONEY JUDGMENT

Even if this Court holds that a federal district court has the inherent power to issue a preliminary injunction restraining a defendant's use of assets to preserve a potential money judgment, such a preliminary injunction may not issue when the district court is exercising diversity jurisdiction and the injunctive relief sought would be unavail-

able under state law.[11] Rather, this Court's *Erie* jurisprudence mandates that a federal district court sitting in diversity must apply state law unless (i) a federal statute or Rule of Civil Procedure controls the issue before the court and that provision represents a valid exercise of Congress' constitutional power or (ii) the application of federal judge-made law does not implicate the concerns of *Erie*—discouraging forum shopping and ensuring equitable administration of the laws.

A. The *Erie* Doctrine

1. *The Statutory Framework*

The issue of the application in the federal district courts of state or federal law has been the subject of much litigation and many decisions by this Court. The analysis necessarily begins with the source of the federal courts' power. It is axiomatic that the federal courts can neither be given nor exercise authority beyond that permitted by the Constitution. *See, e.g., Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1940). Article III of the Constitution, augmented by the necessary and proper clause of Article I, § 8, cl. 18, gives Congress the power to establish a system of federal district and appellate courts and to promulgate procedural rules governing litigation in those courts. The first Congress exercised this power in enacting the Judiciary Act of 1789. The current version of section 34 of the Judiciary Act, known as the Rules of Decision Act, provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

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[11] In *Deckert, De Beers*, and *First Nat'l*, the jurisdiction of the respective district courts was predicated on the existence of a federal question. *See First Nat'l*, 379 U.S. at 380; *De Beers*, 325 U.S. at 215; *Deckert*, 311 U.S. at 285.

62 Stat. 944, 28 U.S.C. § 1652 (1998). Thus, where no provision in the Constitution, a treaty, or a federal statute governs, the federal courts must use rules drawn from state law. Without making any substantive alteration in the Rules of Decision Act a much later Congress enacted the Rules Enabling Act, which gave this Court the

> power to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . and courts of appeals. Such rules shall not abridge, enlarge or modify any substantive right.

104 Stat. 5115, 28 U.S.C. § 2072 (1990).

2. *Major Decisions Of This Court*

For almost a century, this Court's analysis of the interplay between state and federal law was predicated on the Court's decision in *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842). In *Swift*, the Court held that federal courts exercising jurisdiction due to diversity of citizenship need not apply the unwritten law of a state as declared by its highest court but rather could use their independent judgment as to what the common law of the state is or should be. *Id.* at 18. The issue in *Swift* was whether a pre-existing debt was adequate consideration for an endorsement of a bill of exchange so as to make the endorsee a holder in due course. Although this Court's prior decisions indicated that under Federal law a pre-existing debt constituted adequate consideration, New York law was unclear. The Court concluded that the New York decisions were not the "laws" of the state within the meaning of the Rules of Decision Act and, accordingly, could be disregarded by the district court sitting in diversity.

Although much criticized, *Swift* survived for nearly a hundred years until the decision in *Erie*, 304 U.S. 64. *Erie* held that, "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress," federal courts

sitting in diversity should follow the substantive law of the states in which they sit. *Id.* at 78. Strictly procedural issues, however, remain subject to federal law. *See, e.g., Sibbach*, 312 U.S. at 10.

In *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-09 (1945), this Court recognized that whether a particular issue is substantive as opposed to procedural only begins the inquiry. The Court described the important issue as whether

> a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?

Id. at 109. The Court held that "the intent of [*Erie*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Id. See also Sun Oil Co. v. Wortman*, 486 U.S. 717, 727 (1988) (holding that the thrust of *Erie* is to ensure "substantial uniformity of predictable outcome" between cases tried in federal and state courts). Thus, the "outcome determinative" test was born.

In *Hanna v. Plumer*, 380 U.S. 460 (1965), this Court first addressed the impact of the Rules Enabling Act on its *Erie* jurisprudence. The Court held that, in a diversity action, Fed. R. Civ. P. 4(d)(1), rather than state law, governed the manner in which process was served. *Id.* at 464. Massachusetts law required in-hand service on the

executor or administrator of an estate, whereas Rule 4 permits service by leaving copies of the summons and complaint at the defendant's home with some person of suitable age and discretion. *Id.* at 461; *see* Fed. R. Civ. P. 4(e)(2). The Court held that when a federal statute or Federal Rule of Civil Procedure conflicts with state law, federal law must be applied unless it violates the terms of the Rules Enabling Act or exceeds a constitutional grant of authority. *Id.* at 464. If the federal law was properly enacted and controls the issue before the court, it prevails over state law and no *Erie* analysis is necessary. *Id.* at 468. It is necessary to employ the "outcome determinative" test of *York* only when there is no "direct collision" between state and federal law. Even then, the court should apply the test with "reference to the twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of the laws." *Id.* at 468.[12]

B. The Question Whether A District Court Is Empowered To Issue A Preliminary Injunction Must Be Decided Under State Law

1. *No Federal Statute Is Controlling*

The court of appeals did not rely on any federal statute or Federal Rule of Civil Procedure as the basis for the district court's power to issue the preliminary injunction. Nor does any federal law control the issue before the Court. Nothing in the Federal Rules of Civil Procedure mandates that an injunction issue in the circumstances

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12 Subsequent holdings of this Court have indicated that federal law is in conflict with state law only when there is an "unavoidable clash" between the federal rule and the state law. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980). *See also S.A. Healy Co. v. Milwaukee Metro. Sewerage*, 60 F.3d 305, 310 (7th Cir.), *cert. denied*, 516 U.S. 1010 (1995) (a state law is in actual conflict with a federal rule when "enforcing the state rule would knock out the federal rule").

present in this case, or under any circumstances.[13] In fact, Fed. R. Civ. P. 65 does not state that injunctive relief is available (let alone required) in any particular case. Rather, it merely dictates the procedural and proof requirements for determining whether a preliminary injunction or restraining order may issue. *See Sims Snowboards, Inc. v. Kelly*, 863 F.2d 643, 647 (9th Cir. 1988); *see also* 13 J. Moore et al., *Moore's Federal Practice* § 65.07 (3d ed. 1998).

2. *New York Law Does Not Authorize The Remedy Provided By The District Court*

New York has a longstanding tradition of rejecting the use of injunctive relief in actions for money damages. New York's first effort at a general compilation of its rules of civil procedure came in 1848 with the enactment of the Code of Procedure (the "Field Code"). Section 219 of the Field Code states that an injunction may issue:

> Where it shall appear by the complaint, that the plaintiff is entitled to the relief demanded, and such relief, . . . consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff, or when during the litigation it shall appear that the defendant is doing, or threatens . . . some act to be done in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted, to restrain such act. And where during the pendency of an action . . . the defendant threatens, or is about to remove, or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition.

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13 As discussed in Point I. C. *supra*, Fed. R. Civ. P. 64 directs a federal district court to rely on state law provisional remedies.

Code of Procedure § 219 (1849). Although the language of § 219 may be ambiguous, the accompanying notes to § 604 of the Throop Code of Civil Procedure (the "Throop Code") (enacted in 1876 as an extensive codification of the detailed amendments to the Field Code) eliminate any uncertainty. The notes to § 604 were expressly intended to clarify the question of whether, under § 219 of the Field Code, a contract creditor could enjoin a debtor from "disposing of his property, pending an action to establish the debt." Throop Code § 604 (1892). The notes state that this question "would be unequivocally answered in the negative. Apart from the violation of long settled principles, involved in an affirmative answer, the remedy by attachment seems to be ample." *Id.*

The Civil Practice Act (the "C.P.A."), enacted in 1921, replaced the Throop Code. C.P.A. § 878(2) provided that:

> Where it appears that the defendant during the pendency of the action threatens or is about to remove or to dispose of his property, with intent to defraud the plaintiff, an injunction order may be granted to restrain the removal or disposition.

The notes to C.P.A. § 878 make clear that such an injunction was only appropriate upon a showing that the plaintiff's underlying cause of action entitled him to equitable relief. Even in equitable actions, however, New York law now rejects the use of a preliminary injunction to restrain a defendant's unrelated assets to preserve a potential judgment. Since the New York State legislature's adoption of the Civil Practice Law and Rules ("C.P.L.R.") and repeal of § 878(2) of the C.P.A.,

> [a]n injunction may no longer be issued on the ground that the defendant merely threatens to dispose of his property not the subject matter of the action, to render himself judgment proof. (CPA § 878(2)). Because an injunction should never issue where there are other adequate remedies and CPLR 6201(3) authorizes an order of attachment in this situation, no hardship will be worked by its omission from the injunction statutes. A preliminary injunction is still unavailable in an action for a sum of money only.

Daley v. Related Companies, Inc., 179 A.2d 55, 60, 581 N.Y.S.2d 758, 761 (1st Dep't 1992), *citing* McLaughlin, J., Practice Commentaries, 7B McKinney's C6301:1 at 209 (1980); *Rosenthal v. Rochester Button Co.*, 148 A.D.2d 375, 377, 539 N.Y.S.2d 11, 13 (1st Dep't 1989).

Under current New York law, a plaintiff seeking a money judgment may obtain an order of attachment when

> the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts. . . .

C.P.L.R. § 6201(3) (McKinney 1992). As the court of appeals acknowledged, however, New York law does not provide for the prejudgment attachment of assets, such as the Toll Road Notes, located outside of New York State.[14] (Pet. App. 8a); C.P.L.R. § 6201. Nor does New York law provide for preliminary injunctive relief in an action for money damages. C.P.L.R. § 6301 (McKinney 1962). New York has expressly decided that attachment is the sole mechanism by which a court may prevent a defendant from assigning, secreting, or disposing of assets in an effort to frustrate a potential judgment. In issuing the preliminary injunction, the district court not only contravened current state law but disegarded New York's long standing legal traditions.

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[14] No state statute purports to authorize the attachment of property outside state boundaries, nor could it constitutionally do so. *See Clark v. Williard*, 294 U.S. 211 (1935); *Fall v. Eastin*, 215 U.S. 1 (1909).

3. *Under* Erie, *The District Court Should Have Relied On New York Law In Determining Whether A Preliminary Injunction Could Issue*

Where, as here, there is a conflict between federal judge-made law and state law, this Court should analyze the conflict with reference to the twin aims of *Erie*. *See, e.g., Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). If application of the federal judge-made law would promote forum shopping or the inequitable application of the law, state law should govern. *Id.* at 27 n.6. This Court's most recent decisions support the application of state law to a litigant's request for preliminary injunctive relief in a diversity action.

In *Gasperini v. Center for Humanities*, 518 U.S. 415 (1996), this Court held that a federal district court sitting in diversity in New York was required to apply the New York standard in determining whether a jury award of damages was excessive. *Id.* at 438. C.P.L.R. § 5501(c) dictates that the New York Appellate Division "shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." By contrast, the federal courts traditionally have authorized remittitur only "if the jury's verdict was so excessive that it 'shocked the conscience of the court.'" *Id.* at 422, *citing Consorti v. Armstrong World Indus., Inc.*, 72 F.3d 1003, 1012 (2d Cir. 1995).

Gasperini therefore presented the question whether to apply federal judge-made law or New York State law under *Erie*. Although on its face C.P.L.R. § 5501(c), which provides the standard of review to be employed by the New York Appellate Division in determining whether a damages award is excessive or inadequate, is arguably "procedural," this Court asked whether the application of C.P.L.R. § 5501(c) would be outcome determinative with regard to the twin aims of *Erie*. *Id.* at 428. The Court concluded that "if federal courts ignore the . . . New York standard and persist in applying the

'shock the conscience' test to damage awards on claims governed by New York law, 'substantial variations between state and federal [money judgments]' may be expected." *Id.* at 429-30, *citing Hanna*, 380 U.S. at 467-68. The Court held that "[j]ust as the *Erie* principle precludes a federal court from giving a state-created claim 'longer life . . . than [the claim] would have had in the state court,' so *Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court." *Id.* at 430-31, *quoting Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533-34 (1949).

In this case, the preliminary injunction issued by the district court provided respondents with an advantage that could not have been provided by a New York state court in identical circumstances. Pursuant to the injunction, GMD's Toll Road Notes could be used only to satisfy a money judgment for respondents. Once the injunction was in place, respondents simultaneously moved for summary judgment and the Turnover Order. (J.A. 110-11). If the district court had adhered to New York law, however, the preliminary injunction could not have issued. GMD would have been able to assign its right to receive the Toll Road Notes, GMD's primary asset, to restructure its financial obligations and pay debts owed to third parties. As both the district court and the court of appeals observed, respondents would have been unable to obtain the remedy that they ultimately obtained. Thus, as in *Gasperini*, the district court disregarded state law in preserving a damages remedy that could not have been preserved under state law.

If the decision of the court of appeals is permitted to stand, both policies underlying *Erie* would be frustrated. First, the availability in federal district court of the preliminary injunction issued in this case undoubtedly would promote forum shopping. In any action in which the defendant's ability to pay an ultimate judgment is in question, a plaintiff able to comply with 28 U.S.C. § 1332

will choose to litigate in federal court solely because of the availability of preliminary injunctive relief to restrain a defendant from dissipating its extraterritorial assets. Second, affirmance of the court of appeals' decision would contravene *Erie*'s goal of ensuring equitable administration of the law. A defendant in complete diversity with the plaintiff could be subjected to restraints on its assets that could not be imposed on a New York defendant in an action brought by a New York plaintiff. As this Court has held, "the accident of a suit by a nonresident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." *York*, 326 U.S. at 108-09. Forum selection should not be predicated on the nature of the remedies available to secure satisfaction of the judgment ultimately to be entered.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

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§ 6201. Grounds for attachment

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

1. the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state; or

2. the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or

3. the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts; or

4. the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, or on a judgment which qualifies for recognition under the provisions of article 53.

L.1962, c. 308; amended L.1970, c. 980, § 1; L.1977, c. 860, § 1.

§ 6301. Grounds for preliminary injunction and temporary restraining order

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has de-

manded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

L.1962, c. 308.